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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1985

HACKNEY, INC., AND WAYNE SCHWEDLAND,

Petitioners,

v.

WILLIAM H. BROCK, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a civil contempt proceeding, are an employer's Fourth and Fifth Amendment rights violated, contrary to the Supreme Court's holding in *Marshall v. Barlow's*, by denying an employer the right to seek a declaratory judgment as to whether OSHA's administrative general inspection plan is unconstitutional?

2. Are an employer's Fourth Amendment rights violated by applying the Supreme Court's holding in the criminal case of *Franks v. Delaware* to determine whether probable cause has been established to issue an OSHA civil administrative search warrant authorizing a general inspection?

PARTIES TO PROCEEDING IN COURT BELOW

In this proceeding, HACKNEY, INC., a division of Trinity Industries, Inc., and WAYNE SCHWEDLAND are Petitioners. WILLIAM H. BROCK, current Secretary of Labor has been substituted as Respondent in place of Raymond J. Donovan.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, HACKNEY, INC., and WAYNE SCHWEDLAND, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 30, 1985.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals (*see*, App. *infra*) is reported at 769 F. 2d 650. The opinion of the United States District Court for the Western District of Oklahoma is reported at 583 F. Supp. 773. (*see*, App. *infra*)

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was rendered on July 30, 1985. A timely Petition for Rehearing was denied on August 23, 1985. On September 27, 1985, Hackney's Motion for a Stay of Mandate Pending Petition for Certiorari was granted. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment, United States Constitution, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, United States Code, Section 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, Section 2201(a), Creation of Remedy, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rules of Civil Procedure, Rule 26(b)(1), paragraph 1, provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissiable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT OF THE CASE

On January 28, 1982, an Occupational Safety and Health Administration ("OSHA") compliance officer appeared at Hackney, Inc.'s plant in Enid, Oklahoma, and stated that he

was there to conduct a health inspection of Hackney's premises. No complaint or evidence that any violations existed in Hackney's plant were presented by the compliance officer. Rather, he indicated that the investigation was a programmed or "general schedule" inspection to be conducted of Hackney's entire premises.[1] Since the requested inspection would have constituted Hackney's seventh inspection in some form by OSHA in less than six years, Hackney requested a valid search warrant as a prerequisite to a search of its premises.[2]

On March 30, 1982, OSHA made an Ex Parte Application to the United States Magistrate in Oklahoma City for a warrant to conduct a general inspection of Hackney's premises. The only alleged probable cause for such warrant was OSHA's so-called "plan" for conducting general, programmed inspections. The Magistrate issued the warrant on March 30 and OSHA returned and served the warrant and a copy of the application for warrant materials on Hackney on March 31.[3] The application for warrant and affidavits reflected that Hackney had been selected for inspection on the basis of an erroneous standard industrial classification (SIC) code.[4]

Since Hackney did not wish to waive its constitutional rights, and desired a judicial hearing on these repeated OSHA inspections and the validity of the warrant and inspection plan, Hackney, pursuant to its counsel's advice, informed the compliance officer that it would not permit entry pursuant to what Hackney contended was an illegal

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[1]R. Vol. I, p. 3, Vol. III, p. 28, Vol. IV, Ex. 3.

[2]Affidavit in Support of Application for Search Warrant of James Brown, R. Vol. I, p. 69.

[3]R. Vol. I, p. 3, Vol. III, pp. 19-20.

[4]R. Vol. I, p. 69, Vol. III, pp. 61-64.

warrant.[5] The Secretary, on June 16, 1982, filed, in the United States District Court for the Western District of Oklahoma, a Petition for Adjudication in Civil Contempt against Hackney and its plant's manager, Wayne Schwedland.[6] Hackney immediately counterclaimed for a declaratory judgment that the warrant was invalid, and that OSHA's inspection plan was discriminatory, unreasonable, and provided for selective enforcement of the act in violation of the Fourth and Fifth Amendments to the United States Constitution.[7]

To support its counterclaim, Hackney requested the production of certain documents from OSHA and attempted to depose OSHA's supervisor, James Brown, regarding the design and application of OSHA's inspection plan. The District Court, however, denied Hackney full discovery[8] and declined to certify the discovery questions raised thereby.[9]

Trial on the merits of the Secretary's contempt action and Hackney's declaratory judgment action was held on July 28, 1983. OSHA's supervisor Brown admitted under cross examination that he had only four inspectors to inspect approximately 150,000 businesses; that many businesses had never been inspected at all; that OSHA had attempted to inspect Hackney for the seventh time in six years because Hackney was "on the list" from the national office; that the national office purchased the list of companies to be inspected from Dun & Bradstreet; that as long as Hackney

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[5]R. Vol. III, p. 20.

[6]The basis of federal jurisdiction over the Secretary's Complaint in the District Court was 28 U.S.C. §§ 636 (e), 1337 (a), and 1345.

[7]The basis of federal jurisdiction over Hackney's counterclaim in the District Court was 28 U.S.C. §§ 1331 and 2201 and F. R. Civ. P. 57.

[8]R. Vol. I, p. 261.

[9]R. Vol. II, p. 13.

was "on the list" they should prepare to be reinspected regularly; and that more than 99% of the other businesses in Oklahoma, including many of Hackney's competitors, are *de facto* exempted from programmed OSHA inspections.[10] Evidence adduced at trial further established that Hackney had been selected for inspection, based on an erroneous and inaccurate standard industrial classification or "SIC" code.[11]

In its March 23, 1984, Memorandum Opinion, the trial court, in reliance on *Franks v. Delaware*,[12] stated it would disregard the evidence as to the unreasonable and discriminatory nature of OSHA's inspection plan in reviewing whether the Secretary had established probable cause for issuance of the warrant because such evidence was beyond the "four corners" of the warrant application. The District Court declined to rule on the Fourth and Fifth Amendment challenges to OSHA's inspection plan, dismissed Hackney's Counterclaim "without prejudice" and held Hackney and Plant Manager Schwedland in civil contempt for failure to honor the warrant. The trial court, by failing to address the fact that Hackney was classified in the wrong SIC group, in effect, also found the Secretary's error to be irrelevant because there was no showing that the erroneous SIC classification was intentional or reckless.

The District Court, on April 6, 1984, entered a formal civil contempt judgment and ordered Hackney to submit to the inspection. Hackney and Schwedland promptly gave notice of appeal and moved the trial court to stay its judgment pending such appeal. By Order of April 13, 1984, the trial court granted the Application for Stay.

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[10]R. Vol. III, pp. 26-40.
[11]R. Vol. I, p. 69, Vol. III, pp. 61-64.
[12]438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

Hackney appealed to the United States Court of Appeals for the Tenth Circuit. On July 30, 1985, the Court of Appeals affirmed the trial court in ruling that "probable cause" for issuance of the warrant had been shown. The Court of Appeals also ruled that the trial court committed no error in barring pretrial discovery and trial testimony outside the four corners of the material submitted to the issuing federal Magistrate — whether relevant to Hackney's declaratory judgment action or to its challenge to the warrant. A timely petition for rehearing was denied on August 23, 1985. On September 27, 1985, Hackney's Motion for Stay of Mandate Pending Petition for Certiorari was granted.

REASONS THE WRIT SHOULD BE GRANTED

PRELIMINARY STATEMENT

This Court's decision in *Marshall v. Barlow's Inc.*,[13] confirmed that the Occupational Safety and Health Administration (OSHA) must obtain a search warrant before conducting a nonconsensual inspection. In that opinion, this Court not only held "that Barlow's was entitled to a declaratory judgment that the act[14] is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent . . . " but also established the standards for establishing administrative probable cause.[15]

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[13]436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978).

[14]Id. at 325.

[15]"Probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that 'reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment].' " 436 U.S. at 320 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967)).

Since that decision, numerous state[16] and federal[17] courts have wrestled with whether an employer may seek a declaratory judgment determining whether OSHA's administrative general inspection scheduling plan is unconstitutional, as well as what evidence establishes administrative probable cause and whether the latter inquiry is limited by the application of *Franks v. Delaware*.[18] From these decisions, and others discussed specifically, *infra*, has emerged a conflict over whether the limitations of *Franks v. Delaware*, though criminal, should be applied in determining if civil administrative probable cause has been established for issuance of a general inspection warrant.

Courts electing to embrace *Franks v. Delaware* in a civil context have refused to allow prosecution of a civil declaratory judgment action, filed as a counterclaim in a civil contempt proceeding, which challenges not only the search warrant sought *instanta* by OSHA, but also the constitutionality of OSHA's underlying inspection plan. The decision below, and others like it, denies the Fourth Amendment rights of an estimated six million employers by endorsing an administrative search warrant which sus-

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[16]*See Mosher Steel - Virginia v. Eva S. Teig, Commissioner of Labor*, 327 S. E. 2d 87, 12 BNA OSHC 1217 (Va. 1985); *Collier Sawmill v. Williams, Commissioner of Labor*, 1984 CCH OSHD ¶26,798 (Ind. Cir. Ct., 1983); *In the Matter of the Occupational Health and Safety Inspection of Custom-wood Manufacturing Company*, 1983 CCH OSHD ¶26,586 (N.M. Dist. Ct., 1983); *Gooden v. Brooks*, 251 S. E. 2d 919 (N.C. App. 1979).

[17]*See Brock v. Gretna Machine and Ironworks*, 769 F. 2d 1110 (5th Cir. 1985); *Donovan v. Mosher Steel Company*, 11 BNA OSHC 1966 (N.D. Ala. 1984), *appeal pending*; *Donovan v. Athenian Marble Corp.*, 535 F. Supp. 176 (W.D. Okla. 1982).

[18]436 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

piciously resembles the general warrant feared by both the framers[19] and this Court.[20]

In the same manner, courts have dismissed civil declaratory judgment actions filed to challenge the constitutionality of the OSHA general administrative inspection plan on the grounds that such suits go beyond the scope of *Franks v. Delaware*. In effect, these decisions suspend the Federal Rules of Civil Procedure in this narrow area, while depriving the employer of his due process right to challenge the constitutionality of the OSHA general administrative inspection program, in addition to the warrant itself. These cases, when read in conjunction with *United States Department of Labor v. Kast Metals Corp.*, foreclose all inquiry whatsoever into the OSHA general administrative inspection plan.[21] Hackney urges these decisions prevent, rather than permit, the courts to make the constitutionally required determination whether "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied

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[19]T. Taylor, *Two Studies in Constitutional Interpretation* 41 (1969); 2 *Legal Papers of John Adams*, 106-147 (Wroth and Zobel, *ed.* 1965); 10 John Adams, *Works*, at 247; Article XIV, Massachusetts Constitution of 1780; Article X, Virginia Declaration of Right, 1776 ("General warrants . . . are grievous and oppressive and ought not to be granted.").

[20]*Marshall v. Barlow's, Inc.*, *supra*, 436 U.S. at 311, 323; *Harris v. United States*, 331 U.S. 145, 157-162, 91 L. Ed. 1399, 67 S. Ct. 1098 (1947) (Frankfurter, J., dissenting), majority opinion overruled, *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969).

[21]In *United States Department of Labor v. Kast Metals Corp.*, 744 F. 2d 1145, 1153-54 (5th Cir. 1984), the Fifth Circuit held that the OSHA general administrative inspection plan could be promulgated without the notice and comment required by the Administrative Procedure Act, 5 U.S.C. §553, because the plan did not have a "substantial impact" on the six million employers subject to inspections pursuant to the inspection plan. The *Kast Metals* court specifically stated that its decision was premised on the fact that the employer's Fourth Amendment interests should be protected by the issuing magistrate and the federal courts. *Kast Metals*, *supra*, at 1155.

with respect to a particular [establishment]." *Marshall v. Barlow's, Inc.*[22]

1. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF ANOTHER COURT OF APPEALS, A STATE COURT OF LAST RESORT, AND THE SUPREME COURT BY DENYING AN EMPLOYER THE RIGHT TO SEEK A DECLARATORY JUDGMENT AS TO WHETHER OSHA'S ADMINISTRATIVE GENERAL INSPECTION PLAN IS UNCONSTITUTIONAL.

In light of this Court's holding in *Barlow's*, awarding a declaratory judgment that a portion of OSHA's statutory scheme was unconstitutional,[23] it would seem well established that a counterclaim requesting a declaratory judgment that the OSHA general administrative inspection plan is unconstitutional would be permissible in response to a petition for adjudication in civil contempt.[24] The Court of Appeals for the Tenth Circuit, in conflict with that procedure, dismissed Hackney's counterclaim for declaratory relief, ruling it was only an attempt to "go behind" the evidentiary matter presented to the federal magistrate in seeking the warrant. In so doing, the Court of Appeals affirmed the District Court's refusal to permit Hackney to "challenge the plan in the manner sought in the contempt proceeding."[25] In treating Hackney's declaratory judgment action as

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[22]436 U.S. at 320, (quoting *Camara v. Municipal Court*, 387 U.S. at 538 (1967).

[23]436 U.S. at 325.

[24]As with the case *sub judice*, the government in *Barlow's* requested the employer be ordered to show cause why he should not be held in civil contempt for refusing to honor the inspection order. 436 U.S. at 315, n. 8.

[25]Hackney's only means to attack the constitutionality of the OSHA's inspection plan was by counterclaim in the contempt proceeding. The law is well settled that apart from a warrant enforcement proceeding, an employer's constitutional challenge to the OSHA inspection plan fails to

nothing more than a challenge to the warrant, the Court of Appeals ignores the fact that the OSHA general inspection plan itself, and not just the warrant, is being challenged. The Court of Appeals' application of *Franks v. Delaware*,[26] and its own decision in *Marshall v. Horn Seed Company*,[27] not only limits the employer's warrant inquiry but also denies an employer's right to bring a civil declaratory judgment action which extends beyond such inquiry.[28]

In addition to the conflict in principle that the Tenth Circuit's ruling has with *Barlow's*, the appealed decision stands in direct conflict with *Mosher Steel-Virginia v. Eva S. Teig, Commissioner*.[29] There, the Virginia Supreme Court, with Justice Cochran writing for the majority, held that an employer who challenges the plan on which a general inspection warrant is based is entitled to seek a pre-search declaratory judgment to determine the constitutional validity of the plan.[30]

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state a justiciable controversy. *See Baldwin Metals Company v. Donovan*, 642 F. 2d 768, 774, n. 13 (5th Cir., 1981); *Donovan v. Mosher Steel Co., supra*, 11 BNA OSHC at 1966; *Mosher Steel - Virginia v. Teig, supra*, 327 S. E. 2d at 91-91. Thus, Hackney's counterclaim for a declaratory judgment in a civil contempt proceeding constituted the only possible vehicle for an employer to contest the constitutionality of OSHA's administrative inspection plan while preserving its Fourth Amendment rights

[26]438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

[27]647 F. 2d 96 (10th Cir. 1981).

[28]*Frank v. Delaware* involved a criminal warrant and should be inapplicable here, as set forth *infra*, at pages 14-16. *Horn Seed* similarly involved an OSHA inspection warrant issued pursuant to a specific employee complaint, and is much more analogous to the criminal warrant discussed in *Franks, infra*, at pages 14-15. Both *Franks* and *Horn Seed* are inapposite to the inspection warrant at issue here, where no allegations of any specific violations by Hackney have been made. *See Gretna, supra*, 769 F. 2d at 1112.

[29]327 S. E. 2d 87 (Va. 1985).

[30]The Virginia Supreme Court, in allowing the employer's declaratory judgment action to proceed, also held the employer was not required to make a *Franks* showing to contest either the validity of the warrant and/or its underlying plan for a general inspection. The Court further noted

Brock v. Gretna Machine & Ironworks, Inc.,[31] by the breadth of its inquiry, contemplates that an employer is entitled to bring a civil declaratory judgment action and discover facts relating to the operation and application of the Secretary of Labor's plan for programmed general inspections.[32] The Court of Appeals for the Fifth Circuit discussed generally the procedure to be followed when an employer challenges the administrative inspection plan underlying a warrant. The Court of Appeals' discussion of this procedure reveals that the employer is entitled to discovery and pursuit of his claim once the employer challenges the reasonableness of the plan or program by filing a declaratory judgment action:

> "The magistrate, and the district court upon challenge, must determine whether the Secretary has prepared a reasonable inspection program and, if so, whether the desired inspection fits within that program. The judicial function is a dual one. It is first encumbent upon the court to review the plan itself to ensure that it contains the specific neutral criteria mandated by *Barlow's*. The court must do so in order to 'balanc[e] the need to search against the invasion which the search entails.' Factored in, and occasioning a certain heightening of review is the inherent difference between a programmed inspection and one based on an employee's complaint asserting the existence of a violation. In the latter instance, the eye witness complaint, if reliable, provides some assurance that work place hazards proscribed by Congress exist. In the former

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that the lack of imminent danger and urgency, the lack of a specific complaint, and the fear of a revived general warrant — when coupled with the overriding importance of the Fourth Amendment — justified any possible delay in enforcement which might result. 327 S. E. 2d at 92, 93.

[31]769 F. 2d 1110 (5th Cir. 1985).

[32]It should be noted that the Court in *Gretna* found it unnecessary to consider the reasonableness of the underlying inspection plan (and hence to consider the discovery of sanctions imposed by the District Court on the Secretary therein), because the OSHA warrant and application on their face were defective. 769 F. 2d at 1112.

> instance, the plan itself provides the only evidence to be weighed against the employer's privacy interests. The court must guard against arbitrariness. A review of the plan itself is required to accomplish this function. The second and co-equally important function of the court is the determination that the particular establishment was appropriately selected under the plan. This requires a consideration of the plan's industry rank list for the state in question and the methodology used in the selection of the particular establishment. The court should also be informed of the Secretary's perception of the desired frequency of inspections of companies on the inspection list and the actual inspection history of the business in question." 769 F. 2d at 1112 (citations and footnote omitted).

The determination of reasonableness referred to above by the Court of Appeals for the Fifth Circuit cannot be made without exploring various provisions of the plan which are not clear on their face by means of a civil declaratory judgment action. Discovery is required both to examine and to evaluate the warrant application and various provisions of the inspection plan. *Hackney* and *Gretna* are in flat disagreement on this right of the employer.

2. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF ANOTHER COURT OF APPEALS AND A STATE COURT OF LAST RESORT ON AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, CONCERNING THE LIMITATION OF AN EMPLOYER'S FOURTH AMENDMENT RIGHTS BY APPLYING *FRANKS V. DELAWARE* IN A CIVIL ACTION.

In *Barlow's*, this Court established that a civil administrative warrant will survive constitutional challenge if it is

issued pursuant to an administrative plan derived from neutral sources and the warrant application adequately explains why an inspection of the particular establishment is within the program.[33] The Court of Appeals below, noting the substantial deference to which the magistrate's finding of probable cause is entitled, held that administrative probable cause had been established and that Hackney was randomly selected for inspection pursuant to a neutral inspection plan.[34]

The opinion below, and *Gretna*, are both in conflict with *Mosher Steel-Virginia v. Eva S. Teig, Commissioner*,[35] on the issue of whether the limitations of *Franks v. Delaware* should be applied to a Court's required determination whether probable cause exists for issuance of a civil administrative search warrant based on a general inspection plan. In distinguishing a civil administrative warrant authorizing a general inspection in accordance with the plan from either a criminal warrant or a civil administrative warrant based

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[33]436 U.S. at 321, 323 n. 20. *See, also, Brock v. Gretna Machine & Ironworks, supra*, 769 F. 2d 1110 (5th Cir. 1985); and *Matter of Northwest Airlines, Inc.*, 587 F. 2d 12, 14, 15 (7th Cir. 1978).

[34]The Tenth Circuit opinion below is in direct conflict with *Gretna* on whether the materials furnished to the magistrate sufficiently explain why an inspection of Hackney is within the program. In *Gretna*, the Fifth Circuit noted that as a minimum the application must contain an accurate establishment list or a description of the procedure and how it was followed in the selection of an employer. *Gretna, supra*, at 1113. Here, the Secretary failed to establish or furnish the magistrate facts in support of OSHA's choice of SIC code used to select Hackney for inspection, OSHA's production of an establishment list in its entirety, and OSHA's admitted local additions or deletions to the establishment list. *Gretna, supra*, at 1113.

[35]327 S. E. 2d 87 (Va. 1985)

on affidavits alleging specific violations,[36] the Virginia Supreme Court summarized its reasons for rejecting the *Franks* limitations:

> "In the present case, there is no allegation in the affidavits of a specific violation or imminent danger. The affidavits merely support an application for a warrant authorizing a general inspection in accordance with a plan scheduled to determine whether there are violations of the Occupational Health and Safety Laws. There is no urgency requiring prompt execution of a warrant for such an exploratory search before the validity of the underlying plan is tested. A general inspection warrant comes uncomfortably close to being the kind of [general] warrant proscribed by the Virginia Bill of Rights . . ."[37]

There is no rational basis for applying a *Franks* criminal standard to restrict review of OSHA's general inspection plan herein. To the contrary, there are compelling reasons consistent with the spirit of *Barlow's* for not so doing. Investigative urgency or suggestion of imminent danger are not a part of the proceeding. There is no urgency requiring prompt execution of a warrant for such an exploratory search before the underlying plan is tested — as there might be in the case of a criminal proceeding or in the case of a safety and health complaint about existing unremedied conditions. To apply *Franks* in this setting is to suspend the Federal Rules of Civil Procedure, thus denying Hackney's due process rights. Furthermore, application of *Frank's* —

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[36] *Franks* was limited to whether a defendant in a criminal proceeding has the right to challenge the truthfulness of factual statements made in an affidavit supporting the warrant. 438 U.S. at 155. *West Point Pepperell, Inc. v. Donovan*, 689 F. 2d 950, 959 (11th Cir. 1982), along with *Marshall v. Horn Seed Company, Inc.*, 647 F. 2d 96 (10th Cir. 1981), have extended *Franks* to civil administrative warrants based on affidavits alleging specific violations.

[37] 327 S. E. 2d at 92.

when coupled with the dismissal of an employer's civil declaratory judgment action challenging the constitutionality of the plan — prevents any inquiry whatsoever to OSHA's or any other administrative agency's plan for the general scheduling of inspections.[38] The Court of Appeals' dismissal of Hackney's constitutional challenge to the OSHA general inspection plan in the contempt proceeding is particularly onerous, since courts have previously foreclosed challenge to the plan under the Administrative Procedure Act[39] and in declaratory judgment actions brought separately from warrant enforcement proceedings.[40]

Unlike a criminal warrant case, or even an administrative warrant based on a specific complaint, application of the *Franks* test precludes much more than just inquiry "behind" the warrant. It precludes any real adversarial challenge, inquiry, or judicial scrutiny into the constitutionality of a general administrative inspection plan which regularly subjects the Fourth Amendment and Fifth Amendment rights of some six million employers nationwide to the unbridled discretion[41] of OSHA.

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[38]In *Brock v. Mosher Steel Company and Roger Love*, No. 85-7210, currently pending in the United States Court of Appeals for the Eleventh Circuit, before Judges Tuttle, Godbold and Frank M. Johnson, Jr., the Secretary has taken the unequivocal position that in no way, should the reasonableness or neutrality of the creation or application of his plan be reviewed. A *Franks* application in that case would put an employer's constitutional rights entirely at the mercy of a magistrate's review of an affidavit based entirely on information and belief in an *ex parte* proceeding.

[39]*United States Department of Labor v. Kast Metals Corp.*, 744 F. 2d at 1153-54.

[40]*Baldwin Metals Company v. Donovan*, 642 F. 2d at 774, n. 13; *Donovan v. Mosher Steel Company*, 11 BNA OSHC at 1966; *Mosher Steel-Virginia v. Teig*, 327 S. E. 2d at 91-92. *See* note 25, *supra*.

[41]See, *Marshall v. Barlow's, Inc.*, 436 U.S. at 323; *see also*, note 20, *supra*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1985, three copies of this Petition for Writ of Certiorari were placed in the United States Mail, certified, return receipt requested, postage prepaid, to counsel for all parties required to be served, said parties being the Solicitor General, Department of Justice, Washington, D.C. 20530, and Andrea Casson, U.S. Department of Labor, Room S 4004, Washington, D.C. 20210.

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FILED
United States Court of Appeals
Tenth Circuit
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HOWARD K. PHILLIPS
CLERK

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RAYMOND J. DONOVAN,
Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

v.

HACKNEY, INC., and WAYNE SCHWEDLAND,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-82-871-R)

Robert E. Rader, Jr. of McCarty, Wilson, Rader & Mash; Ennis, Texas, Attorney for Defendants-Appellants.

Andrea C. Casson (Francis X. Lilly, Solicitor of Labor; Frank A. White, Associate Solicitor for Occupational Safety and Health; and Judith N. Macaluso, Assistant Counsel for Appellate Litigation; with her on the brief), U.S. Department of Labor, Washington, D.C., for Plaintiff-Appellee.

Before BARRETT and McWILLIAMS, Circuit Judges, and KERR, District Judge.*

McWILLIAMS, Circuit Judge.

*Honorable Ewing T. Kerr, United States District Judge for the District of Wyoming, sitting by designation.

A federal magistrate issued the Secretary of Labor a warrant authorizing a work-site inspection of Hackney, Inc. for possible violations of the Occupational Safety and Health Act, 29 U.S.C. §651, *et seq.* Hackney is located in Enid, Oklahoma and is engaged in the business of manufacturing welding fittings. However, the OSHA agent, armed with an inspection warrant, was denied entry to the plant by the plant manager, Wayne Schwedland, who was acting on instructions from Hackney's counsel. The Secretary then instituted the present proceeding by which it sought to hold Hackney and its plant manager in civil contempt. In the contempt proceeding, Hackney filed a counterclaim for a declaratory judgment that the inspection warrant was invalid because the warrant application failed to establish probable cause and because OSHA'S "general administrative plan" for scheduling programmed inspections of job sites was invalid on several grounds.

After trial, the district court held that there was probable cause for the issuance of the inspection warrant. Further, the district court refused to permit Hackney to challenge the "plan" in the manner sought in the contempt proceeding. Accordingly, the district court held both Hackney and Schwedland in contempt, ordering that Schwedland be committed to the custody of the United States Marshal and that Hackney pay a civil fine of $1,000 per day, until such time as they purged themselves of contempt. The district court's Memorandum Opinion appears as Donovan v. Hackney, Inc., 583 F. Supp. 773 (Colo. 1984). Hackney and Schwedland appeal.

The inspection warrant here involved was not based on specific evidence of an existing violation of the Act at the Hackney plant. Rather, in the instant case the request for an inspection warrant was made by Jack F. Ostrander, counsel for OSHA. Attached to the request was an affidavit of James E. Brown, III a Supervisory Industrial Hygienist for the Oklahoma City area OSHA office. In his affidavit, Brown stated, *inter alia*, that the purpose of the proposed inspection was to determine whether the conditions at Hackney's workplace were in compliance with Sections

5(a)(1) and 5(a)(2) of the Act, 29 U.S.C. § 654 (a)(1) and (a)(2), and the applicable regulations regarding health hazards, and that Hackney had been randomly selected for inspection through a programmed health inspection plan. Attached to Brown's affidavit were several supporting materials, including a copy of the plan. Based on this showing, the federal magistrate found "administrative probable cause" and issued the inspection warrant.

The initial question, in our view, is whether the federal magistrate acted on "probable cause" in issuing the warrant authorizing an inspection of the Hackney plant. If he did not, then, under Marshall v. Horn Seed Co., Inc., 647 F. 2d 96 (10th Cir. 1981), the district court in the present proceeding should have quashed the warrant and dismissed the contempt petition. However, unlike the district judge in *Horn Seed*, the district judge in the instant case held that the federal magistrate did act on probable cause, and we are disinclined to disturb such ruling.

As earlier stated, this is not a "specific evidence" case; i.e., OSHA is not acting, for example, on an employee's complaint that his employer is violating the Act. Both "specific evidence" and "programmed" OSHA inspections, however, are governed by a lower standard of "probable cause." As stated by the Supreme Court in Marshall v. Barlow's, Inc.:

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. *Probable cause in the criminal law sense is not required.* For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court,* 387 U.S., at 538. *A warrant showing that a specific business has been chosen for an OSHA*

> *search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources* such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, *would protect an employer's Fourth Amendment rights.* We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions. (emphasis added).

436 U.S. 307, 321-22 (1977)

In the instant case, the district court ruled that the federal magistrate acted on probable cause. Donovan v. Hackney, 583 F.2d 773, 778-79 (W.D. Okla. 1984). We agree that the material before the federal magistrate supports the district court's ruling that the magistrate acted with probable cause as it appears from our review of the warrant application that the Secretary's decision to inspect the Hackney plant was based on random selection under a programmed health inspection plan.[1] We have held that a magistrate's finding of probable cause in a criminal setting is entitled to substantial deference, United States v. Wood, 695 F.2d 459, 464 (10th Cir. 1982), and we now hold that such a rule is equally applicable in this case. The district court, in the instant case, carefully analyzed the materials before the federal magistrate and concluded that the magistrate had probable cause to issue an inspection warrant. We are in accord with the district court's handling of the probable cause issue. *See* 583 F. Supp. at 778-79. We note that the intrusion here is relatively minimal; this is an *inspection* of a *workplace* where employees freely enter, not a search of private residence. Not only is the intrusion minimal, but the bur-

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[1]Hackney's suggestion that it has been singled out for six plant inspections in six years does not stand up under closer scrutiny. Supporting material attached to Brown's affidavit shows that there was a programmed safety inspection in 1976, with two follow-up inspections, and a programmed health inspection in 1977, with two follow-up inspections, also in 1977, and no further inspections until the present proposed inspection in 1982.

dens on enforcement of the Act would be great if OSHA were not allowed to obtain an inspection warrant on the basis of a programatic plan. Thus, we hold that "administrative probable cause" is satisfied in the instant case, as Hackney was randomly selected for inspection pursuant to a neutral inspection plan.

Both in pretrial discovery and by proffered evidence upon the trial of this matter, Hackney sought to go "behind" the evidentiary matter presented to the federal magistrate. More specifically, Hackney sought to show that OSHA'S so-called "plan" was in the first instance improperly drawn, and thereafter improperly promulgated, and then improperly applied to Hackney, violating, *inter alia*, Hackney's Fourth and Fifth Amendment rights. The district court declined to permit such pretrial discovery and, at trial, ultimately rejected evidence which would go outside the "four corners" of the material submitted to the issuing federal magistrate. *See* Franks v. Delaware, 438 U.S. 154 (1978); Marshall v. Horn Seed Co., 647 F.2d 96 (10th Cir. 1981). On appeal, Hackney strenuously argues that the district court erred in thus restricting Hackney. We perceive no error.

In *Horn Seed*, we stated that "in [i]n ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge." 647 F.2d at 104. Hackney admittedly seeks a consideration of information which was *not* before the issuing magistrate. *Horn Seed*, in our view, precludes such efforts. We do not believe that Marshall V. Barlow's, Inc., 436 U.S. 307 (1977) envisions the expanded evidentiary inquiry here sought by Hackney in its efforts to resist an inspection of its plant; an inspection, incidentally, which is itself limited and subject to restrictions as set forth by the magistrate in his order. Rather, *Barlow's*, in our view, suggests that inspection warrants, which are required under that opinion, are to be issued *ex parte* and "executed without delay and without

prior notice . . ." 436 U.S. at 316.[2] We see no reason to impose cumbersome discovery procedures on the enforcement of an OSHA inspection warrant.[3]

On motion, the district court awarded the Secretary the sum of $5,705.12 for costs and expenses. The parties agreed to that sum as being "reasonable," although Hackney reserved the right to contest the award of any sum whatsoever. Hackney challenges the award thus made.

In its brief, Hackney concedes that an award of costs and expenses, including attorney fees, in a proceeding of this sort is a matter that rests within the discretion of the trial court, and that such an award may not be disturbed on appeal unless there be an abuse of such discretion. *See* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984). We find no abuse of discretion. "Good Faith," assuming that Hackney had such, does not necessarily preclude an award of costs and expenses to the Secretary. Donovan v. Enterprise Foundry, Inc., 751 F.2d 30 (1st Cir. 1984). By choosing to refuse to comply with an inspection warrant and seeking a motion to quash, an employer runs the risk of being held in contempt and being assessed costs. Babcock and Wilcox Co. v. Marshall, 610 F.2d 1128, 1136 (3d Cir. 1979).

All judgments are affirmed.

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[2]We are here concerned with Hackney's pre-inspection rights, vis-a-vis, the inspection warrant, and, in our view of the matter, we are not concerned with any post-inspection rights Hackney may have. Also, we would note that in the context of a strictly criminal proceeding, any attack of the sufficiency of a search warrant almost invariably comes *after* the search, not before.

[3]United States v. New Orleans Public Service, Inc., 723 F.2d 422 (5th Cir. 1984), is, in our view, easily distinguishable. In that case, the General Services Administrator's field officer could select a company for inspection on his own; there was no "plan" as in the instant case. Thus, there was much greater discretion on the part of the agency, and the issue of how the company was selected became, in the Fifth Circuit's view, subject to more searching scrutiny. We also note that in *NOPSI* no warrant had been issued; thus, the posture of *NOPSI* differed from that in the instant case because no neutral magistrate had approved the method by which the business had been chosen for inspection.

FILED
March 23, 1984
Herbert T. Hope
Clerk, U.S. District Court
By Kathy Hess
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

Vs.

HACKNEY, INC., AND WAYNE SCHWEDLAND,
Defendants.

CIV 82-871-R

MEMORANDUM OPINION

This action was instituted by the Secretary of the United States Department of Labor, Occupational Safety and Health Administration (OSHA), upon its Petition for Adjudication in Contempt. The petition alleges that the Defendants, Hackney, Inc. and Hackney's plant manager, Wayne Schwedland, violated an order of this Court in refusing to allow an OSHA inspection after being served with a duly issued search warrant. The Defendants have counterclaimed for a declaratory judgment that OSHA's program for selection of establishments to be inspected is invalid as violative of the fourth and fifth amendments to the United States Constitution. The case was tried to the Court on July 28, 1983. The Court now issues this Opinion, which constitutes its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedures.

On January 26, 1982, OSHA Compliance Officer Landis Powell appeared at Hackney's plant in Enid, Oklahoma, to conduct a regularly programmed inspection of the premises. Plant manager Wayne Schwedland refused to allow that inspection, and on March 30, 1982, James Brown, III, a

Supervisor Industrial Hygienist with OSHA, appeared before Magistrate Paul Lindsey to obtain an administrative search warrant. The magistrate reviewed the affidavit of Brown and other attached materials and concluded that administrative probable cause had been established. The magistrate then issued the Inspection Warrant ordering Hackney's to permit the OSHA inspection.

Brown gave the warrant to Compliance Officer Heather Hartman, who appeared at the Enid plant at 8:30 A.M. the following day. Hartman presented her credentials and the inspection warrant to Schwedland, who asked her to wait while he called Hackney's attorney. Hartman waited in the lobby until 9:30, returning to Schwedland's office only to find that she would have longer to wait. At 11:00 she called Brown, who instructed here to stand by while Schwedland determined if the inspection would be permitted. Hartman waited through the lunch period, and again called Brown at 1:00 P.M. and at 2:30 P.M. At this point Brown spoke by telephone with Schwedland, advising the plant manager that Hartman was being sent to her next inspection location. Brown further requested that Schwedland advise him when Schwedland decided if the inspection would be allowed. Hartman left the plant at this time, never having conducted the ordered inspection. At some time after 4:00 P.M., Schwedland telephoned Brown to inform him that no inspection would be allowed.

Thus, the issue before the Court is whether Hackney and Schwedland should be adjudged in contempt of court for refusal to comply with the Inspection Warrant. However, the Defendants' counterclaim raises the preliminary issue of the scope of review to be used by the Court in determining the sufficiency of the warrant issued by the magistrate. This issue arose first in the context of pretrial discovery; OSHA resisted the Defendants' attempts to discover materials other than those presented to the magistrate with the warrant application. The Defendants filed a Motion to Compel, to which OSHA responded by filing a Motion for a Protective Order. The Court referred the dispute to Magistrate Lindsey, who heard argument and ultimately foreclosed dis-

covery on matters outside the warrant application. This order, issued September 3, 1982, was appealed to and affirmed by this Court on December 30, 1982. Thus, the Defendants were prevented from discovering materials alleged to support their counterclaim for declaratory judgment.

The issue was not yet resolved, however, as the Court permitted testimony at trial concerning matters other than those relevant to the warrant application. Now the Court must determine whether such evidence was properly admitted, and if so, whether Hackney and Schwedland can prevail on their counterclaim.

In *Marshall v. Barlow's* 436 U.S. 307 (1978), the United States Supreme Court put to rest the notion that administrative inspections could be forced upon an unwilling business without a search warrant. A problem not put to rest, however, was the question of what scope of review should be used to examine a magistrate's probable cause finding in administrative search cases. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court reaffirmed the position that review of a search warrant must be limited to examination of materials presented to the magistrate, in the absence of intentional or grossly negligent false statements made to the issuing magistrate. Although *Franks* involved warrant review in a criminal case, it is generally accepted that the same reasoning applies to administrative inspection warrants. *See, e.g., West Point-Pepperell, Inc. v. Donovan,* 689 F.2d 950, 959 (11th Cir. 1982); *Marshall v. Horn Seed Co., Inc.*, 647 F.2d 96, 100 (10th Cir. 1981). Thus, the traditional requirement that review of the warrant be confined to the "four corners" of the application is applicable to review of administrative inspection warrants.

The four corners requirement is often considered unsatisfactory in the administrative setting because it tends to preclude certain constitutional challenges during contempt proceedings. For example in *Marshall v. Barlow's*, the Supreme Court held that administrative probable cause could be established by showing that the selected workplace

had been chosen for the inspection on the basis of an administrative plan derived from neutral sources. 436 U.S. at 321. Thus, the plan itself plays a key role in review of the inspection warrant. However, certain aspects of the plan not considered by the issuing magistrate in his probable cause finding might make the plan subject to challenge despite the fact that probable cause otherwise exists. If applied by the reviewing court, the four corners requirement would prohibit review on those bases. It is this apparent "Catch 22" that is highlighted by the Defendants' counterclaim in this case; they seek to challenge the OSHA plan, CPL 2.25B, because it was allegedly improperly promulgated[1] and because it has an alleged discriminatory effect. Neither allegation is one which could have been considered by the magistrate in issuing the search warrant.

Thus, the question to be answered is how one may attack the validity of an OSHA selection plan, absent some indication of invalidity within the four corners of the warrant application. It would be gross understatement to say the courts have struggled in attempting to find a satisfactory answer to that question, but two basic methods have emerged. The more recent approach is that the party named in the inspection warrant refuses to permit the inspection and raises its challenges to the plan in contempt proceedings. Some courts have allowed parties in this posture to conduct discovery and present evidence outside the four-corners requirement for purposes of attacking the validity of the plan. *See, e.g., Donovan v. Athenian Marble Corp.*, 535 F. Supp. 176, 180 (W.D. Okla. 1982) (per Brett, J.). The obvious problem with this procedure is that it ignores the four corners requirement of warrant review. *See, e.g., Donovan v. Gretna Ironworks, Inc.*, No. CIV-82-1507 (E.D. La. Aug 24, 1983) (Magistrate's Order finding *Franks* inapplicable to the administrative search setting).

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[1]It was stipulated at trial that CPL 2.25B was not promulgated under the Administrative Procedures Act, 5 U.S.C. §553. The issue is whether the plan is a procedural rule, not subject to § 553, or a substantive rule, thus subject to the § 553 notice and comment requirements.

The second approach is that the named party allows the search and attacks the validity of the plan in subsequent citation proceedings before the OSHA Review Commission. This procedure has the advantage of allowing the concerned agency to rule on its own challenged regulation before recourse is taken to the federal courts. *See Parisi v. Davidson*, 405 U.S. 34, 37-8 (1972). After this administrative remedy is exhausted, federal appellate court review is available pursuant to 29 U.S.C. § 660 (1982). *Baldwin Metals Co., Inc. v. Donovan*, 642 F.2d 768 (5th Cir. 1981); *In Re Worksite Inspection of Quality Products, Inc.*, 592 F.2d 611 (1st Cir. 1979). The criticism of this approach is that although the procedure protects the aggrieved party from citations based on the invalid selection plan, it does not protect against the unreasonable search itself. *Weyerhauser Co. v. Marshall*, 592 F.2d 272, 276 (7th Cir. 1979); *Marshall v. Huffhines Steel Co.*, 488 F. Supp. 995, 997 (N.D. Tex. 1979), *aff'd* 645 F.2d 288 (5th Cir. 1981). For this reason, some courts find this procedure appropriate only where the allegedly unreasonable search has already taken place. *See, e.g., Baldwin Metals Co., Inc.*, 642 F.2d at 774 n. 13.

It is into this Sargasso Sea that the Court must navigate in determining the viability of the Defendants' counterclaim. The Defendants assert that the exclusive method to challenge the validity of the plan is to refuse to allow the inspection and present their case at these contempt proceedings. As has been mentioned above, this is not an exclusive remedy, but only one of two possible approaches. It devolves upon the Court to determine whether the procedure chosen by the Defendants is appropriate in the case at bar.

The Court concludes that the latter approach is preferable for purposes of the instant case. To adopt the pre-inspection approach would render the four corners

requirement meaningless in review of inspection warrants.[2] The Court cannot conclude that the Supreme Court imposed the warrant requirement on administrative searches only to abandon the four corners requirement, long an integral part of warrant jurisprudence. *See Aguilar v. Texas*, 378 U.S. 108 (1964). Such a position is unsupported by controlling case law and would further dilute the fourth amendment warrant requirement already weakened by application to administrative searches. *See See v. Seattle*, 387 U.S. 541, 547-8 (1967) (Clark, J., dissenting).

Further, the Tenth Circuit Court of Appeals has provided some guidance on which method of challenge is appropriate. In *Marshall v. Horn Seed Co., Inc.*, 647 F.2d 96, 100 (10th Cir. 1981), that Court determined that the four corners requirement applied to reveiw of inspection warrants. Although the Court was not considering a case involving a counterclaim, as in this case, neither did the Court use language indicating that such a case might be an exception to the rule. Indeed, in a case where the defendant chose the post-inspection approach to challenge the validity of the warrant, the Tenth Circuit showed its approval of administrative review by requiring the defendant to exhaust his administrative remedies in the OSHA Review Commission proceedings before invoking the power of the federal courts. *Robert K. Bell Enterprises, Inc. v. Donovan*, 710 F.2d 673, 675 (10th Civ. 1983). Thus, the Tenth Circuit seems to have indicated a preference for the post-inspection challenge.

The most formidable obstacle the Court must face in adopting a post-inspection challenge as the proper procedure in this case is the charge that such a procedure fails to protect the Defendants against a potentially unconstitutional search. If the Defendants are required to reserve their challenges to the plan for an OSHA Review Commission

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[2]It is interesting to note that, in his order denying the Defendants' Motion to Compel, Magistrate Lindsey characterized the Defendants' counterclaim as a "fishing expedition" designed for the purpose of avoiding the four corners requirement. With that statement the Court is inclined to agree.

hearing, they will obviously have to submit to the inspection. However, the Court concludes that the warrant application hearing conducted in this case is sufficient to protect the Defendants' fourth amendment interests. It is axiomatic that the instrusion occasioned by an administrative inspection is much less substantial than the intrusion occasioned by search of a private home, as the relaxed probable cause standard for inspection warrants indicates.[3] *See*, 387 U.S. at 545. Further, *Barlow's* is largely concerned with ensuring that inspections scheduled pursuant to a program are in fact "programmed", as distinguished from an arbitrary or harassing selection of a business for inspection. 436 U.S. 312; *Donovan v. Wollaston*, 695 F.2d 1, 5 (1st Cir. 1982). Thus, given the attenuated fourth amendment intrusion sought to be prevented, the Court can protect the Defendants adequately by reviewing the warrant on the same basis as did the magistrate, that basis being an assurance that OSHA's selection of Hackney for inspection was pursuant to a neutral plan. To provide further review would require the Court to set a higher standard than did the Supreme Court in *Barlow's*, and, given an intrusion that is decidedly less substantial than most intrusions protected by fourth amendment jurisprudence, the Court is unwilling to do so.

Because the Court concludes that a post-inspection challenge to the validity of OSHA's selection plan is preferable to the procedure used by the Defendants in this case, the Defendants' counterclaim is dismissed[4] without prejudice.[5]

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[3]The temptation to draw a parallel to the analogous criminal setting is irresistible. The victim of a criminal search warrant rarely, if ever, has an opportunity to challenge the validity of a search warrant before it is executed. It would be anomalous for the victim of the less intrusive commercial inspection to have a better right to challenge the warrant than the victim of the more intrusive search of a private home.

[4]Implicit in this order of dismissal are an affirmance of the Court's ruling limiting discovery and a determination that evidence outside the four corners of the warrant application should have been excluded. Accordingly, the Court will disregard the extraneous evidence in reviewing the sufficiency of the inspection warrant.

[5]The Court takes care to note that dismissal is without prejudice to preclude any dispute as to whether the Defendants' claims have been con-

The only remaining issue for the Court's consideration is whether the inspection warrant obtained by OSHA was issued upon probable cause.

Reviewing courts should show substantial deference to determinations of probable cause made by a magistrate. *Edmondson v. United States*, 402 F.2d 809, 813 (10th Cir. 1968). In passing on the magistrate's finding of probable cause, the reviewing court is required to limit its consideration to evidence presented to the magistrate to secure the inspection warrant. *West Point-Pepperell*, 689 F.2d at 959; *Horn Seed Co.*, 647 F.2d at 104. The one exception to this "four corners" rule occurs when the aggrieved party makes a preliminary showing that false evidence was presented to the magistrate, either intentionally or recklessly. *Franks*, 438 U.S. at 158.

The scope of review in this case must be confined to the materials presented at the warrant application hearing. Although at trial the Defendants attempted to make a *Franks* showing of false statement, they totally failed to show that any false statement, if in fact made, was made intentionally or recklessly.[6] Thus, the Court will review the magistrate's finding on the same evidence available to the magistrate, with proper deference given as noted in the above authorities.

OSHA submitted an affidavit by Brown and a copy of the selection plan, CPL 2.25B, for the magistrate's consideration. The affidavit gave, *inter alia*, Hackney's Standard Industrial Code, and explained how that code was relevant

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sidered on the merits. They have not, and it is left to future OSHA Review Commission proceedings, should they be necessary, to determine the Defendants' challenges to the validity of OSHA's selection plan.

[6]The Defendants attempted to show that a false statement was made when the magistrate was advised that Hackney belonged to Standard Industrial Classification (SIC) 3443. The Defendants' contention was that Hackney belonged to SIC 3498. Although Hackney's proof that it belongs in the latter group leaves something to be desired, that Court is satisfied that a lack of intent or recklessness disposes of the *Franks* issue.

to the selection plan. Based on these materials, the magistrate concluded that Hackney had been selected pursuant to CPL 2.25H, and that CPL 2.25B represented a general administrative plan for enforcement of OSHA regulations derived from neutral sources, as required by *Barlow's*. The magistrate then issued the warrant.

The Court is of the opinion that the inspection warrant was issued upon probable cause, and thus affirms the ruling of the magistrate. Without detailing the rather lengthy plan in this opinion, the Court concludes that CPL 2.25B is in fact a general administrative plan for the enforcement of OSHA regulations. The Court further finds that plan is derived from neutral sources; it is difficult to see how one following the plan could be deemed arbitrary. Further, given the testimony received at trial, the Court finds no reason to disturb the magistrate's finding that Hackney was selected pursuant to the plan. Brown's testimony at trial does not cast doubt upon the truth of his assertion in the affidavit.

The Court notes that similar presentations have been held to be sufficient to establish probable cause. In *Donovan v. Wollaston*, 695 F.2d 1 (1st Cir. 1982), the Court was particularly impressed by the inclusion of the selection plan in the warrant application. The Court concluded, as does this Court, that the plan negated any idea that the defendant had been selected arbitrarily. *Id.* at 5. Further, the Court held that the affidavit was sufficient to establish that the defendant was selected pursuant to the plan. *Id.* at 6.

As in this case, the defendant in *Wollaston* asserted that the affidavit should explicitly set out the computations used in executing the selection process. The *Wollaston* court rejected such a notion: "We do not see the magistrate as the Secretary's [the Secretary of Labor] auditor." 695 F.2d at 6. This Court is in agreement; as in *Wollaston*, it is enough in this case that the magistrate was persuaded that the enforcement personnel had followed the plan.

The Defendants' offer one final challenge to the warrant in that they assert it is too broad in scope. This claim focuses on the fact that the warrant permits use of personal

sampling devices. Although the Defendant did present some evidence that Hackney had forbidden use of personal sampling devices due to dangerous incidents involving their use, the Court is unpersuaded that it would be unreasonable to allow OSHA to inspect the plant by this method. The Court need only note that the use of personal sampling devices has heretofore been considered reasonable. *In Re Kast Metals Corp.*, 638 F.2d 42, 46 (8th Cir. 1981); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1102-03 (5th Cir. 1980).

Thus, it is the judgment of this Court that the inspection warrant was issued upon probable cause and was not overboard in scope. Refusal to allow the OSHA Compliance Officer to conduct an inspection of the Enid plant was therefore contempt of this Court. Defendants assert that Schwedland should not be found in contempt, as he merely performed a service for Hackney; however, the Court need only note the prominent role played by Schwedland in preventing the OSHA inspection to dismiss this contention. Accordingly, both Schwedland and Hackney are adjudged in contempt of court. The Court orders that Schwedland be committed to the custody of the United States marshal and that Hackney pay a civil fine of $1,000 per day, both beginning March 30, 1984 until the Defendants purge themselves of said contempt.

IT IS SO ORDERED this 23rd day of March, 1984.

/s/ DAVID L. RUSSELL
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

FILED
April 6, 1984
Herbert T. Hope
Clerk, U.S. District Court
By Nancy Estep
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

Vs.

HACKNEY, INC., AND WAYNE SCHWEDLAND,
Defendants.

CIV 82-871-R

JUDGMENT

This action having come on for trial before the court on July 28, 1983, and a memorandum opinion having been entered on March 23, 1984, it is therefore

ORDERED, ADJUDGED AND DECREED that Defendants Hackney, Inc. and Wayne Schwedland be, and they hereby are, adjudicated in civil contempt of this court; and it is further

ORDERED, ADJUDGED AND DECREED that they be, and they hereby are, required to purge themselves of their contempt of this court; and it is further

ORDERED, ADJUDGED AND DECREED that Defendant Hackney, Inc. pay a civil fine of $1,000 per day and that Defendant Wayne Schwedland be committed to the custody of the United States Marshall, both beginning at 1:00 p.m., Monday, April 16, 1984, until they purge themselves of their contempt of this court.

Signed this 6th day of April, 1984.

/s/ DAVID L. RUSSELL
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE
Entered in Judgment 4-6-84

UNITED STATES COURT OF APPEALS
For the Tenth Circuit

JULY TERM — August 23, 1985

Before Honorable James E. Barrett, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Ewing T. Kerr*

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

HACKNEY, INC. AND WAYNE SCHWEDLAND,
Defendants-Counterclaimants,
Appellants.

Nos. 84-1495
84-1568
85-1287

This matter comes on for consideration of appellants' motion for leave to substitute counsel and appellants' petition for rehearing, filed in the captioned cause.

Upon consideration whereof, appellants', Hackney, Inc. and Wayne Schwedland, motion for leave to substitute counsel is granted. Frederick W. Addison, III and Vic Houston Henry shall be substituted as attorneys for appellants. Attorney Robert E. Rader, Jr. is granted leave to withdraw as appellants' attorney.

It is further ordered that appellants' petition for rehearing filed in the captioned cause is denied.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

*United States District Judge of the District of Wyoming, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

JULY TERM — September 27, 1985

Before Honorable James E. Barrett, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Ewing T. Kerr, District Judge*

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

HACKNEY, INC. AND WAYNE SCHWEDLAND,
Defendants-Counterclaimants,
Appellants.

Nos. 84-1495
84-1568

This court has for consideration appellants' motion for stay of mandate pending petition for certiorari, and appellee's response stating that the appellee does not oppose appellants' motion.

It has further been represented to the court that the parties waive any requirement for a bond pending the filing of appellants' petition for certiorari.

Upon consideration whereof, the court orders the mandate in the captioned case stayed until November 21, 1985, pending certiorari. If, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellants have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

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*Of the United States District Court for the District of Wyoming, sitting by designation.

Further, no bond shall be required pending this stay.

HOWARD K. PHILLIPS, Clerk

/s/ ROBERT L. HOECKER

By Robert L. Hoecker
Chief Deputy Clerk